IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ENERGY AUTOMATION SYSTEMS, INC.,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NO. 3-06-1079**
XCENTRIC VENTURES, LLC, d/b/a BADBUSINESS BUREAU and/or BADBUSINESSBUREAU.COM and/or RIP-OFF REPORT and/or RIPOFFREPORT.COM, and EDWARD MAGEDSON a/k/a ED MAGEDSON,	)	**Judge Aleta Trauger** **Magistrate Judge Juliet Griffin** **JURY DEMAND**
Defendants.	)	

PLAINTIFF'S MOTION AND MEMORANDUM FOR AN EXTENSION OF TIME FOR SERVICE OF SUMMONS AND COMPLAINT UPON DEFENDANT ED MAGEDSON

Pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, Plaintiff Energy Automation Systems, Inc. ("EASI") moves the Court to extend until June 22, 2007, the time for service of the Summons and Complaint upon Defendant Edward Magedson a/k/a Ed Magedson ("Magedson").

I. PROCEDURAL HISTORY

EASI filed its initial Complaint against Xcentric Ventures, LLC ("Xcentric") and its manager Magedson on November 6, 2006. EASI successfully served Xcentric on November 17, 2006 via certified mail. (Doc. No. 6.) Notwithstanding hiring a

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professional investigator and process server in Arizona, EASI has not been able to serve Magedson. It is apparent that Magedson is avoiding service.[1]

At the onset of this litigation, EASI's counsel was generally aware of the difficulty other litigants have had in serving Magedson.[2] Accordingly, EASI hired a process server with experience serving him in other litigation. (Declaration of Robin Rennells ("Rennells Decl.") at ¶ 3.) Ms. Rennells or someone from her office has attempted to serve Magedson approximately nine (9) times. (Id. at ¶ 4.) Their attempts to date have been unsuccessful because, in the opinion of Ms. Rennells, "Mr. Magedson has taken steps to actively avoid receiving service of process." (Id. at ¶ 5.)

II. ARGUMENT

Federal Rule 4(m) governs the timeline for serving a complaint and summons:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court . . . shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good

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[1] Plaintiff's counsel has asked Xcentric's counsel if it represents Magedson. As evidenced by the attached email from Xcentric's counsel, Xcentric's local counsel "have not been retained to represent Mr. Magedson." (Email from James A. Freeman to Chip Campbell dated March 22, 2007, attached as Exhibit A.)

[2] EASI is not alone in finding Magedson difficult to serve. Magedson is notoriously difficult to serve, in the recent words of a newspaper reporter, due to "his efforts to live off the public-records grid":

> Magedson guards his privacy maniacally. His business address is a post office box. The house where he lived until recently was owned by one of his limited liability companies — and he had to move, he says, when his enemies figured out his location, despite his precautions. Even his car and utilities are registered in a way that renders them untraceable.

Sarah Fenske, The Real Rip-Off Report: Ed Magedson Calls Himself an Advocate; His Enemies Call Him an Extortionist, Phoenix New Times (Feb. 1, 2007), available at http://www.phoenixnewtimes.com/2007-02-01/news/the-real-rip-off-report (last visited April 12, 2007) (attached as Exhibit B).

> cause for the failure, the court shall extend the time for service for an appropriate period.

"[T]he 120-day provision operates not as an outer limit subject to reduction, but as an irreducible allowance." Henderson v. United States 517 U.S. 654, 661 (1996).

Rule 4(m) establishes a two-part approach to extensions. First, a court must grant additional time for service if the plaintiff shows good cause for not meeting the 120-day period. 1 James. Wm. Moore, Moore's Federal Practice § 4.82[1] (3d ed. 2006); see also United States v. Ninety-Three Firearms, 330 F.3d 414, 426 (6th Cir. 2003).

EASI has demonstrated good cause in three ways. First, Magedson has evaded service through "his efforts to live off the public-records grid" discussed above. Indeed, active avoidance of service is the classic example of "good cause." Friedman v. Presser, 929 F.2d 1151, 1157 (6th Cir. 1991) ("Legislative history provides only one example where an extension for good cause is appropriate – when the defendant intentionally evades service of process."); Fed. R. Civ. P. 4(m) advisory committee's note ("Relief may be justified . . . if the defendant is evading service . . . .").

Second, EASI has made reasonable efforts in attempting service. See Habib v. GMC, 15 F.3d 72, 74 (6th Cir. 1994). As noted above, EASI hired a process server with experience attempting to serve Magedson, and the server has attempted service approximately nine times. (Rennells Decl. at ¶¶ 3-4.)

Third, absolutely no prejudice to Magedson would ensue from an extension because he has had actual notice of this lawsuit. See United States v. McLaughlin, 470 F.3d 698, 701 (7th Cir. 2006) ("When delay in service causes zero prejudice to the defendant or third parties (or the court itself), the granting of extensions of time for service, whether before or after the 120-day period has expired, cannot be an abuse of discretion.”). As the founder and “manager” of Xcentric (Declaration of Edward Magedson at ¶ 2, Doc. No. 17), Magedson likely knew of this suit at the time Xcentric was served, especially considering that Xcentric is currently represented by Magedson’s longtime counsel, Maria Speth. In fact, Magedson has already submitted a lengthy declaration in support of Xcentric’s motion to dismiss for lack of personal jurisdiction. (See Doc. No. 17.) Without question, Magedson already knows about the claims asserted against him in this case.

Rule 4(m) also provides a second method for granting extensions, giving a Court discretion to allow additional time even if no good cause is shown. Mallory v. Metro. Gov’t, No. 3:05-0473, 2006 U.S. Dist. LEXIS 16207, at **2-3 (M.D. Tenn. Mar. 14, 2006) (Trauger, J.) (granting extension and noting that a court may extend time for service even without a showing of good cause); Moore, supra, at § 4.83.

Addressing the very same Defendants in a similar case, a district court in Illinois granted an extension of time for service of the summons and complaint. George S. May Int’l Co. v. Xcentric Ventures, Inc., No. 04C6018, Doc. No. 30 (N.D. Ill. Jan. 14, 2005) (copy attached). That court eventually ordered Speth to accept service on Magedson’s behalf. See id. at Doc. Nos. 55, 57 (copies attached).

Accordingly, EASI respectfully requests that this Court grant it an extension of time until June 22, 2007, to serve the Summons and Complaint on Magedson. Additionally, EASI requests that this Court enter an order requiring Xcentric –

Magedson's company – to provide an address for Magedson at which service may be effected.

If EASI is unable to perfect service within that period, EASI will request permission to perfect service via publication or alternate service upon Xcentric or Magedson's counsel.

III. CONCLUSION

For the foregoing reasons, EASI requests an extension until June 22, 2007, to perfect service on Defendant Edward Magedson.

Respectfully submitted,

s/ John R. Jacobson
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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing document was made via electronic mail using the Electronic Filing System upon the following:

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this 23rd day of April, 2007.

s/ John R. Jacobson